

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Jeanette M. Pahl,

Complainant,

vs.

Nick Mucciacciaro, Ward 1 Councilman,

Respondent.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
EVIDENTIARY HEARING**

TO: Jeanette M. Pahl, [Street Address Redacted], Afton, MN 55001; and Nick Mucciacciaro, [Street Address Redacted], Afton, MN 55001.

On November 18, 2008, Jeannette Pahl filed a Complaint with the Office of Administrative Hearings alleging that Nick Mucciacciaro, Ward 1 Councilman, violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material concerning the November 2008 Afton city council and mayoral elections.

Following a review of the Complaint and attached documents, the undersigned Administrative Law Judge has determined that the Complaint sets forth *prima facie* violations of Minnesota Statutes § 211B.06. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter will be scheduled for a prehearing conference and an evidentiary hearing, to be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101.

Pursuant to Minn. Stat. § 211B.35, the evidentiary hearing must be held within 90 days of the date the complaint was filed.

You will be notified of the dates and times of both the prehearing conference and evidentiary hearing, and the three judges assigned to hear this matter, within approximately two weeks of the date of this Order. The evidentiary hearing will be conducted pursuant to Minnesota Statutes § 211B.35. Information about the evidentiary hearing procedures and copies of state statutes may be obtained online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law

Judges. Parties should bring with them all evidence bearing on the case with copies for the Administrative Law Judges and the opposing party.

After the evidentiary hearing, the Administrative Law Judges may dismiss the complaint, issue a reprimand, or impose a civil penalty of up to \$5,000. The panel may also refer the complaint to the appropriate county attorney for criminal prosecution. A party aggrieved by the decision of the panel is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 600 North Robert Street, P.O. Box 64620, St. Paul, MN 55101, or call 651-361-7900 (voice) or 651-361-7878 (TTY).

Dated: November 19, 2008

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

The Complaint alleges that in October of 2008, Respondent, Nick Mucciacciaro, prepared and disseminated a letter to the residents of Afton, Minnesota. The Complaint alleges that this letter related to candidates for election to local offices and that Mr. Mucciacciaro made claims in the letter that he either knew were false or communicated them with reckless disregard as to whether they were false.

Mr. Mucciacciaro is the incumbent Afton City Councilman for Ward 1. He did not to seek re-election to this post during the balloting this year.

The letter at issue is entitled "State of the City." In it, Mr. Mucciacciaro both praises a previous city council for assembling nearly \$300,000 in a budget reserve, and criticizes the current city council for not adding to that reserve fund. Mr. Mucciacciaro further claims in the letter that the current city council spent down the earlier-accumulated reserve. The Complaint contends that the following sentence in the letter is false:

In fact, the reserve [fund] has been spent down to where it stands at only \$60,000.

The Complaint maintains that as of September 30, 2008, the reserve fund was \$302,757, and that the fund has been maintained “in the \$300,000 range” for several years. The Complaint alleges further that Mr. Mucciacciaro knew that the claim that “the reserve [fund] has been spent down to where it stands at only \$60,000” was false when it was disseminated because, as a sitting councilman, Mucciacciaro receives and reviews monthly balance sheets prepared for the City by the city accountant.

The Complaint alleges that Mr. Mucciacciaro disseminated the “State of the City” letter close to the election in order to promote the election of three council member candidates that he was supporting – namely, Kuchen Meyer, Bill Palmquist, and Randy Nelson. The Complainant has attached to the complaint Mr. Mucciacciaro’s letter and the City of Afton’s balance sheet as of September 30, 2008, which shows a balance of \$302,757 in the “Special Reserve Fund.”

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of specific facts.¹

The statute does not bar criticism that is merely unfair or unjust.² The statute is not intended to prevent criticism of candidates for office, or to prevent unfavorable deductions or inferences from a candidate’s conduct; even if those conclusions might be misleading or incomplete.³ Likewise, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.⁴

¹ See, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

² *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which “told only one side of the story,” or were merely “unfair” or “unjust,” without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)

³ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

⁴ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986) (citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974)).

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.⁵ Based upon this standard, the Complainant has the burden at an evidentiary hearing to show by clear and convincing evidence that the Respondent prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent “in fact entertained serious doubts” as to the truth of the campaign material or acted “with a high degree of awareness” of its probable falsity.⁶

The statement regarding the size of the reserve fund is one that is capable of being proven true or false. It also refers to the character or acts of candidates for election to local office, and as such, comes within the purview of Minn. Stat. § 211B.06. Lastly, Ms. Pahl has averred that Councilman Mucciacciaro acted with awareness that his claims as to the size of the budget reserve were not correct.

The Administrative Law Judge concludes that the Complainant has alleged sufficient facts, and provided sufficient evidence, to state a violation of Minn. Stat. § 211B.06. Therefore, this matter will be referred to the Chief Administrative Law Judge for assignment of a three-judge panel.

E. L. L.

See also, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); ; *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990).

⁵ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁶ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also, *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), *rev. denied* (Minn. 2006).